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FACULTY PERSPECTIVES

{Recent Scholarship Highlights}

SPRING 2016

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Law & Economics



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About IIT Chicago-Kent Faculty Perspectives

IIT Chicago-Kent Faculty Perspectives is published regularly to highlight recent faculty scholarship at IIT Chicago-Kent College of Law. Issues can be accessed online at www.kentlaw.iit.edu/faculty/recent-scholarship. For questions, email facultyscholarship@kentlaw.iit.edu.

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{Introduction}

IIT Chicago-Kent College of Law is a vibrant community of scholars. Each year we welcome new visiting professors of legal writing and fellows with a variety of specialties. These programs are intended to provide the time, space, mentoring, and resources needed to launch academic careers, while we reap the benefit of their energy, enthusiasm, friendship, and new approaches. In this issue, we focus on the innovative work of some of these junior scholars, and juxtapose them with one of the most renowned and senior members of our faculty. We are particularly excited that, as intended, some of our junior scholars will be moving to new faculties. We will miss them, but we wish them the very best of luck. In the coming months, the cycle will continue, and new junior scholars will join us as we continue to expand our scholarly impact.

{Climate Change}

ADDRESSING CLIMATE CHANGE

DOMESTIC INNOVATION,
INTERNATIONAL AID AND
COLLABORATION

published in N.Y.U. JOURNAL OF INTELLECTUAL PROPERTY
& ENTERTAINMENT LAW

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Joy Xiang's expertise is in global patent practice, patent counseling, patent procurement and portfolio development. She has worked in the high-tech industry since 1996, in roles such as software engineer and program manager for Motorola and later as in-house counsel for Microsoft.

Ms. Xiang was educated in law, public policy, technology entrepreneurship, and computer science. After practicing law for 10 years, she appreciates being in academia, where she can use her accumulated learning and experiences and expand her understanding through research and discussions with students and colleagues. Ms. Xiang's research currently focuses on exploring ways to enhance systems and communities for better innovation and collaboration.

For more, visit her faculty webpage [here](#).

ADDRESSING CLIMATE CHANGE

Domestic Innovation, International Aid and Collaboration

BY JOY Y. XIANG

“[T]he question before us is no longer the nature of the challenge – the question is our capacity to meet it.”

- Barack Obama

In December 2009, at the 15th global climate change conference in Copenhagen, leaders from 115 nations gathered to negotiate an international agreement for addressing climate change. The agreement was expected to include provisions to enhance the international transfer of technologies capable of adapting to or mitigating climate change. Unfortunately, the talks stalled. Developed and developing nations disagreed on a host of issues, especially the treatment of intellectual property rights (“IPR”) protecting clean technologies. Even before the Copenhagen conference, developing nations proposed to exclude clean technologies held by developed nations from patent protection. Developed nations, meanwhile, considered that IPR should not be part of the global climate change negotiations and proposed to remove provisions dealing with IPR from the negotiations.

The Copenhagen conference resulted in a non-binding

An excerpt from Addressing Climate Change: Domestic Innovation, International Aid and Collaboration, 5 *N.Y.U. Journal of Intellectual Property & Entertainment Law* 196 (2015).

agreement that did not reference IPR issues. Nevertheless, the debate regarding IPR persisted through the subsequent global climate change negotiations. The global climate change conference, held in Lima in December 2014, presented both developed nations' and developing nations' positions regarding IPR as equal options to be negotiated at the next global climate change conference in Paris in December 2015. The agreement resulting from the 2015 Paris conference, however, did not mention IPR issues; just as in the Copenhagen conference, the preference of developing nations was not reflected.

The debate regarding the treatment of IPR in the climate change context

Property Organization ("WIPO"), the United Nations Environmental Programme ("UNEP"), the World Meteorological Organization, and the World Bank have all initiated discussions to resolve the divide. The stakeholders in this discussion include governments, public entities, and commercial entities from developed and developing nations, and those with interests in combatting climate change. To date, these shareholders are still searching for effective solutions.

As discussed in Part I.B, addressing climate change is a pressing issue; in order to meet the 2°C goal, we need to reduce 60% of the anthropogenic GHG emissions by 2050, using 2000 as a base line. Rapid development and deployment

[A]n ongoing divide exists between developing and developed nations regarding the role of IPR in the international transfer of clean technologies for addressing climate change."

breaks down as follows: developed nations insist on strong IPR for clean technologies, viewing IPR as indispensable for incentivizing the development of such technologies and facilitating their deployment. Conversely, developing nations have sought to weaken or even remove IPR for clean technologies, viewing the existence of IPR as a major barrier to the international transfer of clean technologies.

Hence, an ongoing divide exists between developed and developing nations regarding the role of IPR in the international transfer of clean technologies for addressing climate change. International agencies such as the World Trade Organization ("WTO"), the World Intellectual

of clean technologies to meet this goal requires developed and developing nations to act independently and collaboratively.

In the past two decades, global climate change technology efforts have focused on the transfer of clean technologies from developed nations to developing nations. The UNFCCC system and the TRIPS Agreement have provided multiple mechanisms to promote such transfer. However, the international transfer of clean technologies to developing nations has been limited, especially to the least developed countries ("LDC"s) and the mid-tier developing nations ("MDC"s). As shown in the figure below, most transfers occur among developed nations, and the transfers to developing nations have

mostly gone to the emerging economies.

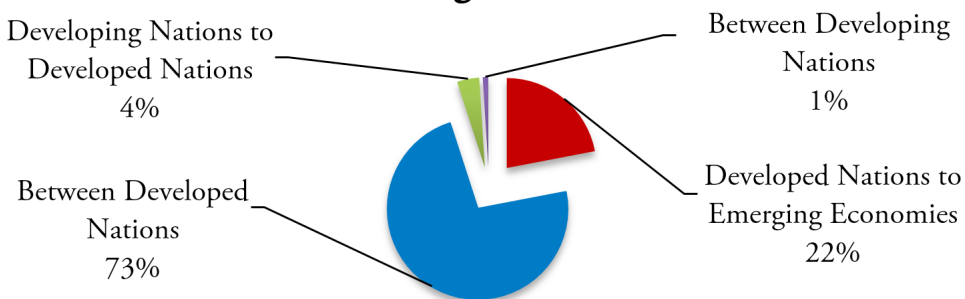
One may ask: why has transfer of clean technologies to developing nations been limited? Is the existence of IPR in fact a major barrier to the international transfer of clean technologies? After reviewing and analyzing currently available data on clean technologies and scholarship regarding international technology transfer, this article finds that the existence of IPR has not been a major barrier to the international transfer of clean technologies. This article also finds that for a nation to attract inbound transfer of foreign technologies, it needs to offer: sufficient IPR protection, the capacity to absorb and adopt foreign technologies, sufficient market size, policy certainty, and transparency. Likely due to a lack of some of such capacity, most developing nations – e.g., the LDCs and the MDCs – have had difficulties attracting foreign clean technologies.

As the analysis in Part II.A shows, the existence of IPR has not been a major roadblock for the transfer of clean tech-

nologies to developing nations. Instead, lack of proper IPR protection for clean technologies may impede the international transfer of clean technologies. Commercial sectors in developed nations play a significant role in the development and transfer of clean technologies, and they are concerned about losing their control of the technologies to be transferred if developing nations do not offer proper IPR protections. Therefore, developing nations need to offer IPR in order to attract inbound transfer of clean technologies. However, developing nations should be allowed to customize their IPR protections to address the realities of their countries' economic development. Strong IPR protections may not benefit all developing nations equally. For developing nations that currently rely on duplicative imitation of foreign practices for technology development, strong IPR protections will likely inhibit such practice and hence the growth of domestic industries.

Meanwhile, IPR is just one of the conditions enabling developing nations

Figure 1. International Transfer of Clean Technologies (2011)



to attract inbound transfer of clean technologies. According to the analysis in Part II.B, in order to attract inbound transfer of foreign clean technologies, a developing nation also needs to have certain capacity. Such capacity includes a good investment environment (such as market conditions, policy clarity and transparency), openness to trade for attracting international technology transfer, and domestic scientific infrastructure and human capital for absorbing and implementing foreign technologies into the local production process.

Developed nations can help developing nations – especially the MDCs and the LDCs – build up the capacity to attract and implement foreign clean technologies. Because of climate change’s global impact and developed nations’ historical contributions to climate change, developed nations have the self-interest and moral duty to help developing nations address climate change, e.g., via international aid. Furthermore, the governments of developed nations can set up domestic initiatives and mechanisms to encourage their commercial sectors to transfer clean technologies to developing nations.

This article proposes that domestic innovation, international aid and international technology collaboration should be the focus, rather than international transfer of clean technologies, in order to effectively address climate change via clean technologies. The proposal aims to encourage the rapid and sustainable development and deployment of clean technologies, while addressing the factors that likely have induced the limited amount of transfer of clean technologies to developing nations during the past two decades.

The proposed solution has three prongs. First, both developed nations and developing nations should stimulate domestic innovations on clean technologies by leveraging diverse tools for encouraging innovations. This includes developed nations optimizing their IPR systems to encourage advancements in clean technologies, along with developing nations building customized IPR systems reflecting their national realities. Second, developed nations and even the emerging economies should provide financial and technical aid to developing nations, especially the MDCs and the LDCs, to help them combat climate change and build the sustainable national capacity to attract, absorb and implement foreign clean technologies. Third, when applicable, developed nations and developing nations should construct collaboration platforms for clean technology developments that would benefit both parties.

In summary, the focus on the international transfer of clean technologies to developing nations in order to address climate change has not worked well during the past two decades. This article analyzes evidential data on clean technologies and their transfer and finds that the existence of IPR has not been a major barrier to such transfer, as suggested by developing nations during the debates with developed nations on how to improve the situation. This article also studies possible reasons for the currently limited transfer of clean technologies to developing nations and concludes that developed and developing nations need to work together to improve the situation. Specifically, developing nations need to improve their national capacities in attracting, absorbing, and implementing foreign clean technologies,

and developed nations have the moral duty and self-interest to provide concrete and effective assistance to developing nations in building such capacities and in helping developing nations address climate change. By understanding and addressing these possible reasons, this article proposes that we focus on domestic innovation of clean technologies, international aid and collaboration, instead of international transfer of clean technologies. This approach makes possible and sustainable the needed rapid development and deployment – including international transfer – of clean technologies, which is essential for us to successfully address climate change.

JOY Y. XIANG SELECTED PUBLICATIONS

Books

Climate Change and Technology Transfer: Innovation, Collaboration, and International Aid (Edward Elgar Publishing, forthcoming 2017).

Articles

How Wide Should the Gate of Technology Be -- Business Method Patentability in China, 11 *Pacific Rim Law & Policy Journal* 795 (2002).

{Family Law}

BIOLOGY, GENETICS, NURTURE, AND THE LAW

THE EXPANSION OF THE LEGAL
DEFINITION OF FAMILY TO INCLUDE
THREE OR MORE LEGAL PARENTS

published in NEVADA LAW JOURNAL

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Myrisha Lewis teaches legal writing at Chicago-Kent and specializes in areas related to family law and criminal law. Prior to joining the Chicago-Kent faculty in 2015, she spent approximately four years as an attorney at the U.S. Nuclear Regulatory Commission in Rockville, Maryland. There, she filed pleadings on behalf of agency staff, advised legal and technical staff on federal rulemakings and statutes, and reviewed staff analyses of new nuclear power reactor licenses and designs. While employed by the U.S. Nuclear Regulatory Commission, Professor Lewis also completed a seven-month detail in the Sex Offense and Domestic Violence Section of the U.S. Attorney's Office in Washington, D.C., as a Special Assistant U.S. Attorney, where she prosecuted domestic violence misdemeanor cases.

Professor Lewis' research and teaching interests include family law, criminal law, comparative constitutional law, European Union law, administrative law, trusts and estates, bioethics, and torts. Her articles have been published in the *Wisconsin Journal of Law, Gender and Society* and the *Charleston Law Review*. She has a forthcoming article in the *Nevada Law Journal*.

Professor Lewis earned a law degree from Columbia Law School and an A.B. in Government from Harvard University. During law school, she was a case law editor of the *Columbia Journal of European Law* and a teaching assistant for a seminar on International Environmental Law. Professor Lewis is a member of the New York Bar and speaks French and Spanish.

For more, visit her faculty webpage [here](#).

BIOLOGY, GENETICS, NURTURE, AND THE LAW

The Expansion of the Legal Definition of Family to Include Three or More Legal Parents

BY MYRISHA S. LEWIS

IN 2000, THE UNITED STATES SUPREME COURT NOTED THAT “[T]HE DEMOGRAPHIC CHANGES OF THE PAST CENTURY MAKE IT DIFFICULT TO SPEAK OF AN AVERAGE AMERICAN FAMILY.” AS A RESULT OF THESE DEMOGRAPHIC CHANGES, “[M]ANY CHILDREN ARE NOW RAISED IN NON-CONVENTIONAL SETTINGS.” THESE “NON-CONVENTIONAL SETTINGS” INCLUDE SETTINGS OCCUPIED BY STEPFAMILIES, SINGLE PARENTS, EXTENDED FAMILY MEMBERS, INDIVIDUALS WHO ARE NOT GENETICALLY OR BIOLOGICALLY RELATED TO THE CHILDREN, AND SAME-SEX PARTNERSHIPS AND MARRIAGES. ON JUNE 26, 2015, THE SUPREME COURT RULED IN *OBERGEFELL V. HODGES* THAT THE FUNDAMENTAL RIGHT TO MARRY APPLIES TO SAME-SEX COUPLES. IN DOING SO, THE COURT NOTED THAT A “BASIS FOR PROTECTING THE RIGHT TO MARRY IS THAT IT SAFEGUARDS CHILDREN AND FAMILIES.” WHILE CHILDREN OF SAME-SEX COUPLES WILL NOW BENEFIT FROM THE RECOGNITION OF THEIR PARENTS’ MARITAL RELATIONSHIPS AND THE RESULTING LEGAL PROTECTION OF THEIR PARENT-CHILD

An excerpt from *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Legal Parents*, 16 *Nevada Law Journal* 743 (2016).

relationships, these children, and other children of “non-conventional settings,” will continue to form relationships with individuals who are “parents” from the children’s perspective, but not legally. Such relationships still need protection and “safe-guarding.”

The legal implications of these aforementioned “non-conventional settings” have been at issue in several other Supreme Court cases including: *Michael H. v. Gerald D.*, *Moore v. City of East Cleveland*, and *Adoptive Couple v. Baby Girl*. As a result, the law has had to adapt to recognize new

parent is biologically (or genetically) related to the child;

4. Marriage, as evidenced by the marital presumption, which purports that the husband is the father of a child born into the marriage; and

5. Functional or de facto parentage, which is based on a putative parent’s actions.

These many bases for parentage, combined with the realities of reproduction, cohabitation, and family interaction, are the reason why children can have more than two parents. In many states, however, to have three instead of two parents is legally impossible. For example, statutory restric-

“Limiting the number of parents a child can have is noticeably disadvantageous for a child with three fit, putative parents, as the child would be deprived of a parent-child relationship.”

foundations for parentage and will likely continue to do so.

Currently, there are at least five bases for recognizing parentage:

1. Biology, as evidenced by the presumption that a woman who gives birth to a child is that child’s parent;

2. Genetics, which is recognized by the Uniform Parentage Act and is most important in the recognition (or disproving) of paternity;

3. Intent, which is recognized in certain jurisdictions such as California, where a court will conclude—especially when assisted-reproductive technology is at issue—that the “parties who had contracted for and intended the pregnancy . . . were [the child’s] legal parents and had support obligations that flowed therefrom,” even though neither

tions may require the demonstration of one or two legal parents’ unfitness as parents before a third party can be granted parental rights; these restrictions also prevent the assertion of de facto parenthood. Limiting the number of parents a child can have is noticeably disadvantageous for a child with three fit, putative parents, as the child would be deprived of a parent-child relationship. Indeed, without the legal recognition of full parentage, children may be deprived of important sources of financial support and contact with their perceived parents, which may be traumatic to them.

In light of social and demographic changes during the past century, this article seeks to resolve the questions of who should be recognized as a parent and what the criteria for legal recognition of parentage should

be. Many other articles focus solely on the parental rights of a group that is marginalized when it comes to legal recognition of their significant roles in a child's life, such as the rights of grandparents, lesbians, same-sex parents, or stepparents. Similarly, the literature that focuses on children's rights as related to parental recognition tends to classify children by certain subsets, focusing, for example, on the rights of children of same-sex couples. This article departs from the existing literature's approach, instead addressing stepparent adoption, same-sex couples, grandparent visitation, and assisted reproductive technology by creating a solution from the perspective of the "best interests of the child"—the historical leading standard in children's protection—rather than from the perspective of the parents' rights. It is likely that legislatures are not familiar with exactly how the best interests of the child standard operates in practice because it is a family law standard that generally arises in an adjudicatory context. This legislative unfamiliarity should not prevent state legislatures from including provisions in parentage statutes and hopefully conducting legislative inquiries into the best interests of the child through expert testimony and research.

Drawing from the best interests of the child standard, this article introduces a new doctrine for parental recognition, "parentage in praxi," which requires (1) that a putative parent complete statutorily delineated requirements that culminate in them standing "in the shoes of a parent," and (2) that state law operate to allow a child to have more than two parents—if doing so would be in the best interests of the child. A parent in praxi would have the same rights and obligations as a legal parent. This article borrows Professor Susan Frelich Appleton's term of "original parent" to refer to the

parents that the law currently identifies as legal parents (those parents who are deemed parents when the child is born). By recognizing parentage in praxi, states can protect the relationships that children have formed with putative parents who may not be currently recognized as legal parents, regardless of the parents' legal status in any sphere not concerning the well-being of the child (e.g., marital status, familial status, or gender).

A discussion of parental rights in the context of the best interests of the child is inescapable. Parents have certain enumerated rights and responsibilities that are constitutionally recognized. Professor Susan Frelich Appleton noted that "the [U.S. Supreme] Court has 'recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children,'" which led her to conclude that "[t]he Supreme Court has reaffirmed the primacy of parental rights under the Due Process Clause." Other scholars note,

Going back to the 1920s in cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court has held that parents have a fundamental constitutional right to raise their children without state interference. Custody orders, public school policies, or other state action that sharply limit the child-rearing role of either parent, the argument goes, substantially burden that right, triggering strict judicial scrutiny. And, under strict scrutiny, the state must show some "compelling interest"—such as imminent harm to the child—to justify its intervention. Incantation of more amorphous interests, including the "best interests" of children, is insufficient.

Yet, the best interests of the child are frequently considered in state actions such as custody orders that could be viewed as limiting the role of a parent. Custody orders are commonplace. When there are

multiple parents, they must share their parental rights and responsibilities, and the recognition of a second or third parent does not upset the constitutional balance between parental rights and the best interests of the child. The child has a right to maintain emotional bonds with multiple legally-recognized parents, and it is generally in the child's best interest to do so.

Parentage in praxi draws its origins from de facto parentage, which will be explained in the Introduction of this article. Part I discusses the best interests of the child standard and the role of a parent. Part II conducts an in-depth analysis of statutory and doctrinal de facto parentage (the doctrine upon which parentage in praxi is based) and other doctrines that recognize individuals' functional parental roles, including the Uniform Parentage Act, in loco parentis, psychological parentage, and visitation. Throughout Part II, the theory of parentage in praxi is expanded, and it is compared to existing legal doctrines for the preservation of third parties' rights. This comparison also highlights some of the drawbacks of parentage in praxi and other doctrines, then

builds upon these drawbacks. Part IV briefly explores the possibility of children actually having three genetic parents, made possible by scientific techniques pending approval in the United States and recently approved for human subjects trials in the United Kingdom.

MYRISHA S. LEWIS SELECTED PUBLICATIONS

Articles

Sex and Statutory Uniformity: Harmonizing the Legal Treatment of Semen, 7 *Charleston Law Review* 235 (2012-13).

Making Sex the Same: Ending the Unfair Treatment of Males in Family Law, 27 *Wisconsin Journal of Law, Gender & Society* 257 (2012).

{Venture Exchanges}

DEMOCRATIZING STARTUPS

PRIVATE INDEPENDENT ANALYSTS

forthcoming in RUTGERS UNIVERSITY LAW REVIEW

Seth C. Oranburg

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Seth Oranburg's scholarship focuses on areas related to business law. Before joining the Chicago-Kent faculty in 2015, he taught courses on Corporations, Closely Held Business Organizations, and Electronic Discovery of Digital Evidence at the Florida State University College of Law. Professor Oranburg's practice experience includes corporate venture capital transactions in Silicon Valley, CA, and antitrust litigation in Washington, DC.

Professor Oranburg's scholarship in business law includes crowdfunding, securities regulations, and shareholder activism. He has recently published articles in the *Fordham Journal of Corporate & Financial Law*, the *Cornell Journal of Law & Public Policy*, and the *Rutgers University Law Review*. He also has written for the *Columbia Law School Blue Sky Blog* and been interviewed by the *Wall Street Journal* and *AboveTheLaw.com*.

Professor Oranburg graduated with honors from the University of Chicago Law School, where he was a member of the Order of the Coif and a Kirkland & Ellis Scholar. He earned his bachelor's degree from the University of Florida, magna cum laude, with a double major in political science and English. Professor Oranburg is a member of the State Bar of California and the Bar of the District of Columbia.

For more, visit his faculty webpage [here](#).

DEMOCRATIZING STARTUPS

Private Independent Analysts

BY SETH C. ORANBURG

Supporters of the Jumpstart Our Business Startups (“JOBS”) Act of 2012, such as President Barack Obama, claim that law will democratize startups by “help[ing] entrepreneurs raise the capital they need to put Americans back to work and create an economy that’s built to last.” The law might accomplish this by allowing startups to sell crowdfunding stock directly to the general public through Internet portals. But the JOBS Act does not provide a way for investors to resell crowdfunding stock. Investors must hold crowdfunding stock until the company goes public (or otherwise liquidates), which could take ten years or more. With so much uncertainty in the interim, investors have good reasons to be skeptical and not buy crowdfunding stock under the JOBS Act.

This Article advocates that democratizing startups requires allowing resale of crowdfunding stock. This Article proposes “Rule 144B,” a regulatory provision that could be enacted without an act of Congress, to permit transparent web-based venture exchanges

with fraud-prevention intermediaries termed “private independent analysts” to resell crowdfunding stock.

To create a resale exemption that works, scholars and regulators first need to understand what could cause such a resale market to fail. The failure of past venture exchanges—platforms where private-company stock can be traded—can be attributed to the fact that companies on venture exchanges have the corporate governance problems of both private corporations and public corporations, with few of the benefits. On one hand, exchange participants lack the investor protections typically found in VC arrangements, such as active monitoring and restrictive covenants that protect against information asymmetries and entrepreneurs’ opportunism. On the other hand, exchange participants lack the information typically provided by public company listing requirements. The information problem is compounded by the fact that exchanges may lack incentives to require their listed companies to make disclosures or to police those disclosures for completeness and accuracy. Crowdfunding investors may be especially vulnerable to these problems because they are not necessarily accredited or sophisticated.

Instead of taking on the worst problems of both VC-funded and publicly-traded companies, this Article proposes that a “144B” exchange could be used to incentivize corporations seeking liquidity to adopt corporate governance that reflects their most successful practices. Therefore, the crux of the 144B exchange must be to return the power of monitoring and disciplining management to the stockholders. This can be accomplished by installing a quasi-VC called the “private independent analyst” or “PIA.” The PIA would represent the shareholders on the venture exchange much like a VC manager represents the members of its

VC fund, except the PIA’s compensation is not based on stock performance. Rule 144B could require all companies listed on a 144B exchange to provide contractual control rights to the PIA, similar to those found in VC contracts. For example, the PIA would have the right to attend board meetings, vote on fundamental corporate transactions (including mergers, major acquisitions, and sales of substantially all assets), prevent the company from issuing more stock, prevent the company from taking on a large senior debt, and vote on management salaries.

In addition to contractual control rights that are similar to what a VC would receive, the PIA would also have responsibilities to produce valuable public information. In the public-company context, stock analysts review publicly available information and often have private access to corporate management. The analyst reviews corporate and systemic information, and reports whether the company is correctly valued by its stock price. This is a valuable service because it centralizes efforts that would otherwise have to be duplicated by all stockholders. This reduces the cost of monitoring a corporation and reduces shareholders’ rational apathy problems. Analyst reports are integral to overcoming corporate governance problems, but it is hard for smaller firms to attract analyst coverage. By requiring 144B exchange-traded companies to produce analyst reports, the micro-cap companies on 144B exchanges could actually have fewer corporate governance problems than small-cap companies on national stock exchanges.

Applying the PIA model to 144B exchanges potentially solves the most serious problem faced by venture exchanges. Venture exchanges may become a “market for lemons” if companies use the venture exchange as a staging ground to catapult into better-regarded markets. The most successful companies on a venture exchange may transfer to a better-regarded exchange

in order to signal that the company is of higher quality. But this also signals that the remaining firms on the exchange are of lower quality, which encourages the next best firms to leave that exchange in order to separate themselves from that pooling equilibrium. This creates a downward spiral that ends with only the lowest quality firms—the lemons—left on the venture exchange.

The PIA model solves the lemons problem by transferring the quality signal from the exchange to the PIA. Having a highly regarded PIA approve a company sends a strong signal about firm quality even

and specific statutory language demonstrate that the SEC is authorized to promulgate Rule 144B.

A 144B safe-harbor exemption—permitting venture exchanges to facilitate resale of private-company stock, including crowd-funded securities, where a “private independent analyst” is employed to monitor and safeguard investments—may solve the economic problems with these secondary markets; the successful operation of these secondary markets is critical for the original-sale exemptions to facilitate efficient capital formations. Without a resale exemption, small, private-company stockholders

“General legal principles, rulemaking history, and specific statutory language demonstrate that the SEC is authorized to promulgate Rule 144B.”

if that firm is trading on an exchange of no repute. The firm no longer has to leave the exchange in order to separate itself from low quality exchange participants because the 144B exchange creates a reputation market for PIAs as well as firms.

A highlight of this Article’s 144B proposal is that this rule can be promulgated by the SEC without an act of Congress. Generally, an agency may implement its delegated authority through rulemaking. When Congress explicitly delegates to an agency rulemaking authority to effectuate a statute, “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” The Exchange Act conferred broad, open-ended rulemaking authority on the SEC. The JOBS Act also granted specific rulemaking authority to the SEC to create new exemptions to securities regulations. General legal principles, rulemaking history,

face many disadvantages. Yet a resale exemption subjects those same small stockholders to the risk of fraud in the market. Therefore, the solution is to create a resale exemption that balances sufficient investor protections with limited disclosure requirements. The development of liquid, transparent, and fair 144B exchanges for the transaction of private-company stock could accomplish this and thereby facilitate the recycling of capital and promote the democratization of startups.

Indeed, the development of multiple 144B exchanges is necessary for efficient capital formation. Vibrant competition among exchanges will allow the optimal combination of disclosure requirements and investor protection to evolve. Exchanges should be allowed to experiment with various levels of disclosure requirements and investors protections, and these exchanges could also facilitate original-sale transac-

tions. The result could be a market for stock markets. Original stock issuers, original stock purchasers and resale investors could shop around for the optimal mix of sun-light and efficiency. This flexibility would help to keep securities regulations from becoming quickly outdated as the nature of investment changes. The SEC could retain the right to permit only certain types of investors into certain markets based on risk of the exchange, amount of investment, sophistication of investor, age of the issuing company, or other factors. The concern for the SEC is to avoid creating new financial asymmetries by giving the wealthiest investors exclusive access to the best markets, as it did with Rule 144A.

Modernizing securities regulation to protect investors while capitalizing the future of innovative startups requires a deeper review of the entire body of securities regulation, which is the subject of my future work. For example, the accredited investor standard, which is based solely on wealth, could potentially be replaced by a more nuanced standard of investor sophistication. Modern technology, like online feedback tools and reputation networks, could provide novel solutions to eighty-year-old securities-regu-

lation problems. The creations of exchanges like those contemplated by proposed Rule 144B could provide a valuable source of data that will help scholars and regulators determine how to modernize other securities regulations.

SETH C. ORANBURG SELECTED PUBLICATIONS

Articles

[Bridgefunding](#), 25 *Cornell Journal of Law & Policy* (forthcoming 2016).

[Startup Financing](#), in *Startup Creation for the Smart Eco-Efficient Built Environment* (F. Pacheco ed., forthcoming 2016).

[A Little Birdie Said: How Twitter is Disrupting Shareholder Activism](#), 20 *Fordham Journal of Corporate & Financial Law* 695 (2015).

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{Copyright Infringement}

UNBUNDLING THE 'TORT' OF COPYRIGHT INFRINGEMENT

forthcoming in VIRGINIA LAW REVIEW

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UNBUNDLING THE “TORT” OF COPYRIGHT INFRINGEMENT

BY PATRICK R. GOOLD

Download the latest episode of *Game of Thrones* from a peer-2-peer network; operate an Internet TV streaming platform; transfer eBook files from your computer to your smartphone; sing *Happy Birthday to You* in a crowded restaurant; use Marvin Gaye’s classic *Got To Give It Up* as inspiration for a modern funk-pop song, and in each case you commit the ever-expanding tort of copyright infringement. Copyright law grants authors the right to control their original creative works. Copying a work without the owner’s permission is tortious. As society’s ability to generate information increases, the scope of that tort widens like falcon’s gyre until it touches upon every life in a rapidly sprawling variety of circumstances. Copyright now regulates such a vast amount of activity that infringement is one of “today’s most prevalent form of property tort.”¹ And yet, despite the growing importance of this tort to the economy, the legal system, and our lives, the judicial test used to

An excerpt from *Unbundling the “Tort” of Copyright Infringement*, 102 *Virginia Law Review* (forthcoming 2016).

determine infringement is bemoaned for its inconsistency and incoherence. Copyright's "infringement analysis" is "a mess"² which makes "no sense,"³ and is so complex that it is a "virtual black hole in copyright jurisprudence."⁴

The test for copyright infringement is superficially straightforward, but in practice beset with doctrinal instability. Technically, proving infringement requires the plaintiff to demonstrate two simple epistemic facts: that the defendant copied expression, and that such copying lead to the creation of a "substantially similar" work. Thereafter, the burden shifts to the defendant to prove that the copying was non-infringing because it was in the service of a "fair use." However, the process of judging similarity has become "frustratingly obscure, ambiguous and confusing,"⁵ while the fair use doctrine is now so "exceedingly difficult to predict"⁶ that some view it as nothing more than the "right to hire a lawyer."⁷ Three particular problems highlight the trouble. First is the "audience problem." Who is the "audience" who gets to judge whether two works are substantially similar: the intended consumers? the ordinary observer? experts in the field? Courts go back and forth between these standards with very little reasoning. Second is the "harm problem." The most important question in the fair use analysis is whether the defendant's copying is harmful to the copyright owner. But what qualifies as harm? For some courts, it is the diversion of third party demand, for others it is the defendant's own failure to pay a license fee. On occasion some courts are even prepared to find harm when the defendant's copying disrupts the owner's non-economic interest in creative control, privacy, and reputation. And last but not least is the "analogy problem." If copyright infringement is a

tort, then what other torts does it most resemble? What other parts of private law can judges look to for guidance on how to design the infringement analysis? But while some judges view infringement as a property tort, and search the law of trespass and conversion for guiding principles, others see infringement as a form of economic tort, and look to unfair competition as the appropriate model for designing the infringement test.

In *Unbundling the "Tort" of Copyright Infringement*, I provide a revised positive theory of copyright infringement law which makes the vagaries of the infringement analysis easier to predict. In a nutshell, the orthodox theory that copyright infringement is one single tort, and there is one single infringement analysis, is incorrect. A more accurate description is that the term "copyright infringement" is a group of distinct torts, each with their own unique infringement analysis. Using an analytic jurisprudence method, I break down copyright infringement into five distinct "copy-torts" and then show how the infringement analysis changes across them. *Unbundling copyright infringement* in this descriptive manner makes it easier for litigants and practitioners to predict how courts will apply the infringement analysis, and provides a blueprint for judges struggling to apply the analysis in hard cases.

First, the orthodox theory that copyright infringement is one singular wrong is incorrect. There is no "tort of land infringement" but instead a group of real property torts; there is no "tort of chattel infringement" but instead a group of personal property torts; and likewise it is better to think not of a "tort of copyright infringement" but a group of copyright-based torts. All of these copy-torts involve copying and the author's exclusive right to copy. But the taxonomy reflects

the different interests underlying that right, and the different ways copying may injure those interests. The five copy-torts can be summarized as follows:

1. Consumer Copying occurs when a consumer accesses the work rather than negotiating for access in the market.

2. Competitor Copying is committed by rival producers who copy in order to lure consumers away from the copyright owner.

3. Expressive Privacy Invasion makes liable those who publish expression the

determine whether the defendant’s copying injures the owner’s legally protected interest. But because copyright protects multiple interests from different types of injury, the infringement analysis simply cannot provide a one-size-fits-all tool. Instead, courts take the generic “infringement analysis” (copying + substantial similarity – fair use = infringement) and modify its doctrine, and the theory underlying it, so that it provides a unique legal test for each of the different wrongs.

To illustrate, consider the difference between “competitor copying” and “consumer copying” cases. The competitor

“[B]ecause copyright protects multiple interests from different types of injury, the infringement analysis simply cannot provide a one-size-fits-all tool.”

owner is trying to keep confidential.

4. Artistic Reputation Injury sanctions copying that causes deterioration of the owner’s professional reputation.

5. Breach of Creative Control holds as tortious acts of decision-making that the law designates to the copyright owner.

Second, the infringement analysis that courts apply is different in each of these different copy-torts. There is no singular test for both trespass to land and nuisance, or for assault and battery, and neither should lawyers expect courts to create a uniform test for copyright infringement. A defendant’s conduct is tortious only if it interferes with a legally protected interest. Copyright’s infringement analysis – including both the substantial similarity and fair use inquiries – is a judicial test to

copying wrong occurs where a rival producer copies from the copyright owner in order to produce consumer demand diversion. For example, in creating *Blurred Lines*, Robin Thicke and Pharrell Williams may copy from Marvin Gaye’s *Got To Give It Up* because doing so will cause some consumers to forego buying Gaye’s song, and to buy *Blurred Lines* instead. When copyright owners sue copyists for this tort, typically courts adopt the intended consumer viewpoint for assessing similarity and the market substitution theory of copyright harm. Consumers will only “switch” between the two works if they view them as economic substitutes, and courts typically want some real-world evidence of the switch before holding the copyist liable. This is highly similar to the general unfair competition cause of action.

Alternatively, imagine the copyist in the case is not Thicke and Williams, but a college student who downloads the Gaye song from a p2p site like The Pirate Bay. The copyright owner's claim is no longer like unfair competition – “you stole my consumers!” – but is more akin to trespass. The owner's claim is that she had the right to exclude individuals from the protected subject matter, and individuals who wish to access it must do so through voluntary market negotiation. Like the trespasser who jumps the fence, the college student has accessed the song outside the channels the law desires. In these cases, whether two works are “substantially similar” is usually subjected to the “ordinary observer” test. Whether consumers should pay the owner depends on the underlying “incentive-access”

tradeoff. The advantage of the “ordinary observer” standard is, like the “reasonable person” standard elsewhere in tort law, it is a legal fiction. There is no real world “ordinary observer.” Instead, this doctrine allows the court to determine whether this is a case where the consumer must pay the owner in order to ensure an adequate return for the copyright owner, and thereafter to label *ex post facto* the two works as “substantially similar” according to the fictitious “ordinary” observer. And, in the cases where the consumer was under a duty to pay for access, the market “harm” is the money that she would have paid had she negotiated for access.

The following table summarizes precisely how courts modify the test for copyright infringement depending on which copy-tort is in question.

	Consumer Copying	Competitor Copying	Expressive Privacy Invasion	Artistic Reputation Injury	Creative Control
Audience for Assessing Similarity	Ordinary Observer	Intended Audience/ Consumer	Ordinary Observer	Intended Audience/ Consumer	Ordinary Observer
Harm in Fair Use	Consumer Failure to Pay	Demand Diversion	Privacy Loss	Demand Suppression	Lost Control
Analogy	Trespass to Land	Unfair Competition	Publication of Private Facts	False Light	Conversion

This is the latest in a series of articles that uses tort theory to help understand and evaluate modern copyright infringement law. In particular, this project was inspired by William Prosser’s famous 1961 article, *Privacy*.⁸ In that article, Prosser demonstrated that “privacy invasion” was not one tort, but actually four different torts. He demonstrated how distinguishing the four torts not only made privacy doctrine more predictable, but also sharpened our awareness of the underlying policy objectives pursued by the law. Half a century later, Prosser’s insight is more relevant than ever in the context of today’s sprawling copyright law.

¹ John C.P. Goldberg & Benjamin C. Zipursky, Torts 251 (2010).

² Kevin Hickey, *Reframing Similarity Analysis in Copyright*, 93 Wash U. L. Rev. 1 (forthcoming 2016).

³ Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. Copyright Soc’y U.S.A. 719 (2010).

⁴ Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 Stan. L. Rev. 3 (forthcoming 2016).

⁵ Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 Nw. U. L. Rev. 1821 (2013).

⁶ Neil Weinstock Netanel, Copyright’s Paradox 66 (2008).

⁷ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 187 (2004).

⁸ William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

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{Law & Economics}

COMPETITION LAW CONVERGENCE

POTENTIAL ROLES FOR ECONOMICS

published in COMPARATIVE LAW AND ECONOMICS

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He writes and teaches primarily in the areas of antitrust/competition law, comparative law, international economic law and globalization studies. He received his B.A. from Trinity College (Conn.), his M.A. from Yale, and his J.D. from the University of Chicago. In 2013 he was awarded the degree of Honorary Doctor of Laws by the University of Zurich, Switzerland.

He has been a visiting professor at the law schools of the University of Pennsylvania, Northwestern University, and Washington University in the United States as well as on the law faculties of the University of Munich and Freiburg in Germany, Stockholm and Uppsala in Sweden, and the Global Law Faculty of Catolica University in Portugal. He has been a distinguished visitor at numerous universities, including the University of Rome (Sapienza), the University of Paris II, the University of Zurich, the University of Aix-en-Provence, and Meiji University (Japan).

He is also a titular member of the International Academy of Comparative Law. He is a founding co-editor of the new books series American Society of Comparative Law Studies in Comparative Law. He was a member of the Executive Editorial Board of the American Journal of Comparative Law from its inception (2007) until 2014, and he is a member of the editorial board of the Journal of International Economic Law and Concurrences (France). His most recent book is *Global Competition: Law, Competition and Global Markets* (Oxford U. Press, 2010, pbk, 2012).

For more, visit his faculty webpage [here](#).

COMPETITION LAW CONVERGENCE

Potential Roles for Economics

BY DAVID GERBER

Discussions of the future of antitrust law (usually known outside the US as “competition law”) are often based on assumptions about the role of economics. Perhaps the most pivotal of these assumptions is that economics can provide a basis for global competition law convergence. It is pivotal because choices and strategies about the future shape of global markets and of economic development often depend on it. A reduction in differences among these systems—often referred to as “convergence”—is often seen as the only viable strategy for responding to the problems and weaknesses of the current legal framework for global markets. To the extent that this proposition is accepted, incentives to evaluate or pursue other strategies such as coordination among states are reduced. Yet the prospects for convergence rest on assumptions about the role of economics in the convergence process, and these assumptions deserve scrutiny.

A summary of *Competition Law Convergence: Potential Roles for Economics*, in *Comparative Law and Economics* 206, (Theodore Eisenberg & Giovanni B. Ramello eds. 2016).

This Article explores these assumptions and addresses the issue of how and to what extent economics can provide a firm basis for competition law convergence. Discussions of convergence often proceed in a kind of abstract haze in which the science of economics is expected to be central to global convergence, but they seldom explain how it can be expected to play this role. Our effort here is to dispel some of the haze surrounding this issue and to suggest a novel and hopefully valuable approach to convergence.

An initial step in this direction is to clarify the objectives of a convergence strategy. The basic aim of such a strategy is to reduce differences among the national rules governing competition and thereby reduce the costs of doing business across borders and improve the efficiency of global markets. This, in turn, is expected to provide benefits to consumers in richer countries and to both producers and consumers in lower income economies. The stakes involved in pursuing a convergence strategy are, therefore, high.

The term “convergence” is often used loosely to refer to reducing differences among competition law systems, but the term is too vague. The high stakes involved in this strategy call for care in identifying more precisely what the term means and entails. Literally, the term “convergence” refers to a process of moving toward a point (a “convergence point”). Identifying that point and analyzing the implications of moving toward it thus become critical for evaluating the potential of the project. The Article focuses on these issues. Note that this analysis refers to voluntary decisions. Decisions that are coerced or required involve different issues and do not play a part in this analysis.

The Article briefly reviews how the convergence strategy came to play such a central role in thinking about the fu-

ture of competition law and of global markets in general. The “deep” economic globalization that began in the 1990s is a key feature of the story. It increasingly undermined confidence in the jurisdictional system that has long provided the legal framework for transborder economic relations. Markets were becoming more global, but the legal framework was—and is—provided by individual states unilaterally exercising jurisdiction over conduct outside their borders. This system increases costs, uncertainty, and inequality in the operation of global markets.

One response was to seek a coordinated framework through the newly-formed

“The ‘deep’ economic globalization that began in the 1990s is a key feature of the story.”

World Trade Organization. Although there was support for this initiative, the US and some other states preferred convergence as the central response to the limitations of the jurisdictional system, and this has led to decades of pursuing and discussing the convergence strategy.

The Article then reviews the reasons given to support the claim that economics must be central to competition law convergence. First, economics is a science and therefore universal and neutral. It is not tied to culture or to institutions, and it does not favor one country or interest group over others. Second, it can be applied anywhere and is therefore global in scope. And third, the economics profession has become an international profession in which the methods of analysis are followed everywhere. There is also a political factor. Economics has become central to competition law in the US and to a growing degree in much of Europe,

and therefore convergence will have to be based on what these countries do and what they would accept.

The claim that economics must be central to the process can easily obscure, however, all-important issues about HOW it can be expected to play that role. The Article reveals that undifferentiated assumptions about the role of economics are not only likely to create uncertainty and impose costs, but also to distort decisions about policy for dealing with these pressing problems. Meaningful analysis requires careful exploration of what is converging toward what, why, and with what consequences. To claim, for example, that decision makers are converging or should converge toward “more economics” is too vague to be of analytical value.

I suggest that distinguishing among the roles or functions of economics in competition law and identifying the convergence potential of each role as well as its implications provides a potentially valuable form of analysis. For each role we look at several questions. First, to what extent is there cognitive alignment among the participants in the process? What do the decision makers know about the relevant issues? Do they share common knowledge about and understanding of economics? Second, to what extent is there institutional/procedural alignment? Are the institutions and procedures of countries involved in the process sufficiently similar that the abstract principles of economic analysis will be translated into decisions in similar ways? Finally, what are the incentives for the decision makers to move toward a particular convergence point?

The Article applies this analysis to three basic roles that economics plays in competition law. One is descriptive. As a social science, the primary tasks of economics are to explain phenomena and to

interpret economic data. Using economics for descriptive purposes is, therefore, generally attractive to decision makers, and if economics is increasingly used for these purposes in many jurisdictions, there may be some indirect effect on convergence. The Article points out, however, that such an effect would necessarily be indirect and limited, and that increased use of economics may have the opposite effect.

A second use of economics is normative. It is the primary focus of convergence discussions. Here the claim is that economics should provide the norms or standards of conduct for competition law—i.e., that the central question in all competition law systems should be whether conduct is “anticompetitive” according to economic analysis. If all competition law systems were to do this, it is claimed, a global standard would emerge that would reduce the potential harms inherent in the jurisdictional framework. The Article looks closely at this claim, identifies its potential, and notes its limitations and the risks associated with it.

Economic science can also provide, however, another point of convergence that deserves attention—its role in supplying methods of analysis. Here the claim is that increased use of basic economic methods can discipline decision making in ways that foster convergence. This form of convergence does not necessarily require particular outcomes, nor does it dictate that economics provides the standards of conduct to be enforced by competition law. It does, however, impose standards on the decision-making process that limit the range of justifiable outcomes and thereby decrease the range of deviation among competition law systems. This makes it adaptable to the needs, goals and resources of each jurisdiction, which in turn increases incentives for decision makers to move in this direction. Each such move

increases convergence.

Economic globalization has led to increased awareness of the weaknesses of the current legal framework for transnational competition, and convergence provides at least a partial response to those weaknesses. The importance of economic science in competition law makes it an important element of any discussion of convergence. Loose references and unfounded assumptions about the roles that economics can and should play in competition law convergence can, however, cloud and distort discussions of the issues. This can, in turn, impede the development not only of competition law, but also of global markets and economic development around the globe. As this Article shows, careful attention to the specific roles that economics can play in convergence reveals that, if used appropriately, it can contribute much to improving the legal framework of global competition.

[PROFESSOR NAME] SELECTED PUBLICATIONS

Books

Global Competition: Law, Markets, and Globalization (Oxford University Press 2000).

Law and Competition in Twentieth Century Europe: Protecting Prometheus (Josef Drexel et al. eds., Edward Elgar 2012).

Articles

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